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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 272

ROSE M. ANDERSON, ET AL., *Petitioners,*

v.

DOUGLAS MCKAY, Secretary of the Interior, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Rose M. Anderson, et al., appellants below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on March 25, 1954.

OPINIONS BELOW

The judgment entered on April 24, 1953 by the District Court of the United States for the District of Columbia overruling petitioners' motion for summary judgment, granting respondent's motion for summary judgment and dismissing petitioners' complaint is set forth at R. 28.

There was no published opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit rendered on March 25, 1954, remanding the case to the District Court with directions to dismiss for lack of jurisdiction, is reported in 211 F. (2d) 798 (App. 28-44).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 25, 1954 (R. 119). An order denying a petition for rehearing was entered on May 11, 1954 (R. 142) (App. 45).

The jurisdiction of this Court is invoked under Title 28, U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

The United States Court of Appeals for the District of Columbia Circuit has construed the Mineral Act of July 17, 1914, c. 142 (38 Stat. 509, 30 U.S.C.A. Sec. 121) as barring Charles J. Anderson, predecessor in interest of petitioners, who applied for a patent to land as a *bona fide* purchaser under Section 5 of the Act of March 3, 1887, c. 376 (24 Stat. 556, 43 U.S.C.A. Sec. 898), from an unrestricted patent to the land in question. The questions presented are:

1. Did the Mineral Act of 1914, *supra,* modify the long-established rule, consistently followed by the Department of the Interior and the courts until the instant case, namely, that a *bona fide* purchaser under Section 5 of the Act of 1887, *supra,* is entitled to a fee simple patent provided that neither he nor the original *bona fide* purchaser from the land grant railroad company knew at the time of their respective purchases that the land was valuable for minerals?

2. If the answer to Question 1 is in the affirmative, is Anderson's right to a fee simple patent under Section 5 of the 1887 Act, *supra,* governed by the general rule set

forth by this Court in *Wyoming* v. *United States*, 255 U. S. 489 (1921), to the effect that where the land is not known to be valuable for minerals at the time that the patent applicant has complied with all of the requirements of the statute and regulations under which he claims, the applicant becomes vested with full equitable title to the land and is entitled to a fee simple patent?

3. Where an applicant for a fee simple patent under Section 5 of the 1887 Act, *supra*, has complied with all of the requirements of the statute and applicable regulations and at that time the land is not known or reported to be valuable for minerals, must he also establish *conclusively* that the land in question does not contain any of the minerals named in the Mineral Act of 1914, *supra*?

STATUTES AND REGULATIONS INVOLVED

The statutes involved include the Act of March 3, 1887, c. 376 (24 Stat. 556, 43 U.S.C.A. Sec. 898); the Act of July 17, 1914, c. 142 (38 Stat. 509, 30 U.S.C.A. Sec. 121); and the Act of February 25, 1920, c. 85 (41 Stat. 437, 30 U.S.C.A. Sec. 181), as amended by the Act of August 21, 1935, c. 599 (49 Stat. 674, 30 U.S.C.A. Sec. 226). Pertinent provisions of these statutes are printed in the Appendix to this petition (App. 45-52).

The pertinent instructions and regulations of the Department of the Interior involved in this petition include the Instructions of February 13, 1889, 8 L.D. 348, promulgated under the Act of March 3, 1887 (R. 96-97), and the Instructions of January 19, 1935 (Circular No. 1344), 55 I.D. 120 (R. 99-100).

STATEMENT

Petitioners, all of whom are American citizens, are the heirs at law of Charles J. Anderson, deceased, also an American citizen during his lifetime (R. 18-19).

In 1897 Anderson bought 160 acres of land in Trego County, Kansas, from a local bank (R. 21). Then bank's chain of title, as shown by the official county land records

(R. 55-65), extended back to 1879 when a land grant railroad company purported to convey the title to one Warren, a *bona fide* purchaser for value (R. 20). The railroad company, in turn, had received the right to acquire title through the railroad land grant statutes of 1862 (12 Stat. 489) and 1864 (13 Stat. 356) (R. 20).

During the latter part of the last century it was Congressional policy to encourage the building of railroads into the West by granting to railroads extensive tracts of western lands, the exact limits of which could only be determined after completion of railroad construction and fixing of rights of way. During the period of construction, prospective homesteaders and others seeking to settle on or purchase public lands were frequently told by the Government land agents that the railroads held title. The unsuspecting purchasers then went to a railroad land agent in an effort to acquire the land. If the railroad felt it had no need for the particular land, it would sell the land despite the fact that under the land grant statutes the railroad did not then have title but only the *right* to acquire title by completing the road and listing the land for patent, following which a patent would be issued by the Government. The amount of land to which a railroad could receive title under a land grant was limited. As a practical matter, the railroad had no further interest in acquiring title to land which had already been sold to a *bona fide* purchaser. Consequently, the railroad would frequently omit that land and list other lands within the grant for patent (App. 29, 34).

To meet this widespread and difficult situation Congress enacted the Land Adjustment Act of March 3, 1887, c. 376 (24 Stat. 556, 43 U.S.C.A. Sec. 898) to provide for the "adjustment" or fixing of the limits of railroad land grants. Section 5 of that Act provides, in part (App. 45):

> "*Rights of purchasers from railroads of coterminous lands not within grants.* Where any said com-

pany shall have sold to citizens of the United States or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns * * *."

Anderson's situation fell precisely within the terms of this remedial provision. In 1879 a land grant railroad company had sold to a *bona fide* purchaser land which was within the primary limits of a railroad land grant. In 1897, through a series of mesne conveyances, Anderson acquired for value from a local bank what he thought was a good fee simple title (R. 61). However, the land was excepted from the operation of the grant because the railroad, having no further interest in the land, failed to list it for patent before the land grant was finally adjusted and closed on October 20, 1930 (R. 20). When Anderson acquired the land in 1897 it was open prairie (R. 73-75). For a few years after acquiring the land, Anderson used it as a pasture. It was fenced in 1900 and since 1905 Anderson and his family have farmed all of the tillable land. Anderson was in open, notorious and exclusive possession of the land from the time of its acquisition in 1897 until his death in 1940 at the age of 91 (R. 22). His heirs, petitioners herein, have continued to occupy and use the land for agricultural purposes up to the present time. Throughout this period Anderson and his heirs have regularly paid taxes on the land (R. 22).

On March 2, 1936 an individual named Buckholts, a complete stranger to the land, having discovered that the

land was excluded from the operation of the land grant at the time that the land grant was finally closed on October 20, 1930, filed an application for a non-competitive oil and gas lease for the land under the Mineral Leasing Act of February 25, 1920, c. 85 (41 Stat. 437, 30 U.S.C.A. Sec. 181), as amended by the Act of August 21, 1935, c. 599 (49 Stat. 674, 30 U.S.C.A. Sec. 226), (R. 19). Some time after the filing of the lease application by Buckholts, Anderson learned for the first time that his land had been excepted from the operation of the railroad land grant. On July 20, 1936, he filed a patent application with the Department of the Interior under Section 5 of the 1887 Act, *supra* (R. 19). At the time that these applications were filed, the land was not within any known geologic structure of a producing oil or gas field. It was not known to contain minerals and there is no evidence that Anderson, Buckholts or the Department of the Interior believed, or had any reason to believe, that the land had mineral value (App. 44).

On August 21, 1936, the Commissioner of the General Land Office issued a decision rejecting Buckholts' lease application and holding that Anderson met all the requirements of Section 5 of the Act of 1887 and was entitled to a patent without reservation of mineral rights to the United States upon publication of notice for a required period of time and payment of $200.00 (the Government price for public lands at $1.25 an acre) (R. 63-66).

Anderson promptly published notice of his application for a patent, filed proof of publication with the Land Office, and paid over the sum of $200.00 for which he received General Land Office Receipt No. 1679003 (R. 21). By October 26, 1936 he had complied with all administrative and procedural requirements contained in the Department's instructions of February 13, 1889, 8 L.D. 348 (R. 96-97), promulgated under the 1887 Act, and set forth in the decision of August 21, 1936 (R. 21).

On September 18, 1936, Buckholts appealed from the decision of the Commissioner of the Land Office, rejecting his lease application (R. 21). Notwithstanding the fact that Anderson had fully complied with the statute and all administrative requirements for a patent on October 26, 1936, the Department of the Interior, on December 31, 1936, reversed the earlier decision of the Commissioner and held that although the facts found by the General Land Office were correct and neither Anderson nor Warren, the original *bona fide* purchaser, had knowledge of mineral value at the time of their respective purchases, Anderson's right to an unrestricted patent under the 1887 Act had been modified by the subsequent enactment of the Mineral Act of 1914 (R. 67-72). The Department held that the 1914 statute made it necessary for Anderson to consent to a mineral reservation by the United States Government in the event the land was *subsequently* found to be actually or prospectively valuable for oil and gas (R. 72). Anderson's motion for a rehearing was denied on February 24, 1937 (R. 22).

In April 1937, the Department, for the first time, asked the United States Geological Survey for a report on the mineral character of the land (R. 22). On June 22, 1937, the Survey reported as follows (R. 22-23):

> "The land referred to is in an area which may contain accumulations of oil or gas under favorable structural conditions and offers an opportunity for prospecting operations to determine the nature and worth of the structural features affecting it. Accordingly, it is reported as having a prospective value for oil and gas within the intent of paragraph 12(c) of the Oil and Gas Regulations."

On August 31, 1940, the Geological Survey issued a second report in which it held that certain evidence which the Department required Anderson to submit in order to prove the non-mineral character of the land did not "conclusively determine the nonoil and nongas character of the land"

(R. 87), and on September 24, 1940, the Secretary denied Anderson's petition for exercise of supervisory authority (R. 86-88). Anderson had died a few months earlier, on March 28, 1940.

On June 6, 1944, the General Land Office closed the case with a notation that no further action had been taken by either Anderson as applicant for the patent or Buckholts as applicant for an oil and gas lease (R. 88). However, in August 1946, the General Land Office reopened the file and asked the Geological Survey for a third mineral report (R. 24). That report, dated September 6, 1946, stated that "no part of it (the land in question) is within the known geologic structure of a producing oil or gas field" (R. 24). On February 26, 1947, the Survey issued a fourth report which was to the same effect as the third report (R. 24). A finding that the land was not within the known geologic structure of a producing oil or gas field was necessary under the provisions of the Act of February 25, 1920, *supra*, as amended by the Act of August 21, 1935, *supra*, under which Buckholts claimed a right to an oil and gas lease without competitive bidding (R. 24).

On May 1, 1947, the Department issued a non-competitive oil and gas lease on the land in question to Buckholts which was subsequently assigned by him on September 5, 1947 to Central Commercial Company for a purported total consideration of $10.00 (R. 25).

From May 1, 1947 until September 26, 1951, petitioners continued to occupy the land as before, and no action was taken against them by Buckholts or his assignee (R. 25). On September 26, 1951, petitioners, having learned of the possibility that Central Commercial Company would commence drilling operations on the land, notified Central Commercial that they did not recognize the validity of the lease and that they would institute judicial and administrative proceedings for the purpose of rescinding the lease if any action were taken to enforce it (R. 25).

On October 8, 1951 Central Commercial Company filed suit in the United States District Court for the District of Kansas to quiet title in the leasehold estate as between the company and Anderson's heirs (Civil Action No. W-302) (R. 25). The Kansas Federal District Court has continued to the present time to defer further action, pending the outcome of the instant cause. The lease to Buckholts and the assignment thereof to Central Commercial Company were not recorded in the office of the Register of Deeds of Trego County, Kansas, until October 26, 1951, after the action to quiet title was started (R. 61-62).[1]

On October 12, 1951 petitioners filed a petition with the Department of the Interior for the exercise of supervisory authority by the Secretary, requesting that an unrestricted patent be issued to them in accordance with the August 21, 1936 decision and that the lease to Buckholts be annulled (R. 25). On May 2, 1952 the Secretary denied the relief requested (R. 91-95).

Having exhausted their administrative remedies, petitioners filed their complaint in the District Court of the United States for the District of Columbia on June 13, 1952, asking the Court to direct the Secretary of the Interior to issue to them as the heirs of Charles J. Anderson a patent without mineral reservation to the United States and to annul the oil and gas lease issued to Buckholts (R. 2-11). Jurisdiction of the District Court was invoked under Title 11, Section 306 of the District of Columbia Code (R. 3). Petitioners and respondent both filed motions for summary judgment (R. 16, 27). On April 24, 1953 the District Court entered a final judgment overruling petition-

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[1] On or about September 30, 1951, the Central Commercial Company began the drilling of an oil well which was subsequently completed as a producing well. Since that date, other producing wells have been completed and are being operated by the Central Commercial Company. Anderson's heirs, petitioners herein, have continued to occupy and to use the land for agricultural purposes to the extent possible in view of the oil operations on the land (R. 22, 26, 75).

ers' motion, granting respondent's motion and dismissing the complaint, all "on the basis of the Act of 1914 and the Mineral Leasing Act of 1920" (R. 28, 54).

Petitioners appealed to the United States Court of Appeals for the District of Columbia Circuit on April 27, 1953 (R. 29), and on March 25, 1954 the Court of Appeals rendered its decision holding that the Mineral Act of 1914 had modified Anderson's right to a fee simple patent under Section 5 of the 1887 Act (App. 28). The court refused to apply the general rule that when a claimant has met all the requirements of the statute under which he claims and the regulations issued thereunder, he becomes vested with complete equitable title and no subsequent discovery of minerals can in any way affect his right to a fee simple patent. Because the land involved was originally within the geographical limits of a railroad land grant, the appellate court held that the exception to the general rule laid down in *Barden et al.* v. *Northern Pacific Railroad Co.*, 154 U.S. 288 (1894), was controlling and that equitable title did not vest in Anderson until his patent application was approved by the Secretary (App. 43). Finding that the Secretary had not exceeded his statutory authority in refusing to approve Anderson's fee simple patent application, the court held that the United States was the owner of the property and an indispensable party to the action. It remanded the case to the District Court with directions to dismiss for lack of jurisdiction (App. 44). A petition for rehearing was filed by petitioners on April 9, 1954 (R. 120) and was denied by the Court of Appeals on May 11, 1954 (R. 142, App. 45).

REASONS FOR GRANTING THE WRIT

I. This case presents an important question of Federal land law which has not been, but which should be settled by this Court, namely, whether the Mineral Act of July 17, 1914, *supra,* modified a *bona fide* purchaser's right to a fee simple patent under Section 5 of the Act of March 3, 1887,

supra. The question affects the titles of a great many persons "owning" land in railroad land grant areas, particularly in the Midwestern and Western States. Many of them, like Anderson in the instant case, are old settlers who have developed and occupied their land for years unaware of the defect in their titles.

The predicament in which the claimants in the instant case find themselves is typical of that of many other "owners" of land originally purchased from a land grant railroad. In 1879, when Warren, the original *bona fide* purchaser from the railroad and Anderson's predecessor in title, purchased the land here involved from the railroad, he believed that he was purchasing land which the railroad owned. The land was geographically situated in an area coterminous with the railroad, was within the primary limits of the grant and was in an odd-numbered section (R. 64). By the simple expedient of listing the land for patent before the final closing of the land grant on October 20, 1930, the railroad could have acquired a fee simple patent to the land and could thereby have validated Anderson's title. By the equally simple expedient of merely failing to list this particular land for patent and in lieu thereof selecting some other land within the limits of the grant, the railroad could leave Anderson and other owners in his situation, without a title to the land which had been purchased in good faith from the railroad.[2]

The final determination as to whether the land here involved, as well as land held by all other persons similarly situated, would be listed by the railroad prior to the final closing of its land grant and the title confirmed in Anderson and all others like him, or whether the land would be excepted from the operation of the grant and the title left unsettled, could not be made until the land grant was ad-

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[2] Since the amount of land which a land grant railroad could acquire under its particular grant was limited, the selfish interest of the railroad would dictate the omission of land previously sold and the selection of other land in lieu thereof.

justed and closed. In this instance, that event did not occur until 1930, a period of 51 years after Warren had purchased the land in good faith from the railroad.[3]

Throughout that period, Anderson and his predecessors in title, had every reason to believe that they held good title to the land in question. Even after the railroad had made its final selection omitting the land in question from the operation of its grant, Anderson, and others similarly situated, would have no reason to suspect that their titles had been invalidated. They would not be advised by the

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[3] The delay in closing the land grant involved in the instant case was not unusual. The records of the Department of the Interior indicate that a number of other railroad land grants were closed between the years 1914 and 1940.

On September 18, 1940, Congress enacted and the President approved the Transportation Act of 1940, c. 722 (54 Stat. 954, 49 U.S.C.A. Sec. 65). The purpose of the Act was to relinquish the existing right of the United States to reduced rates on property carried for the Government by land grant railroads and in return to secure the release by the railroads of all of their existing rights to lands or interests in lands granted to them, but as to which title had not then passed. At that time land grants to a number of railroads were still open, including the grants to the Central Pacific Railway Co., the Northern Pacific Railway Co., the Southern Pacific Railroad Co., Great Northern Railway Co., and the Santa Fe Pacific Railroad Company.

It is significant that the said Act contained the following provision:

> "* * * Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, *or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value,* * * *". (Emphasis supplied.)

Despite the clear intent of Congress in the above-quoted section to fully protect and "confirm" the title of a *bona fide* purchaser, nevertheless, under the decision of the Court below in the instant case, an innocent purchaser for value could be deprived of a complete fee simple title to his land if (a) the land were determined to be mineral in character prior to the actual issuance of a patent, or if (b) some third party interloper should file a mineral lease application to the land prior to the issuance of a patent.

railroad, or by the Department of the Interior, of the final closing. Their first opportunity to learn of the invalidation of their title would come, as it did to Anderson in the instant case, when some third party attempts to acquire an interest in the property. In the instant case, Anderson had no way of knowing that his land had been excluded from the operation of the grant until Buckholts, the interloper, filed an application for a non-competitive mineral lease on Anderson's land.

In order to cure this situation and to protect *bona fide* purchasers such as Anderson, Congress adopted Section 5 of the Act of March 3, 1887, *supra*, giving the *bona fide* purchaser, or his successor in title, the preferential right to obtain a fee simple title to the land in question at the ordinary Government price for public land.

In *Gertgens* v. *O'Connor*, 191 U.S. 237 (1903), this Court described the general purpose of the 1887 Act as "remedial * * * to do equity to all parties claiming interests within these various [railroad] grants". (p. 242) As to *bona fide* purchasers from a railroad company and their successors in interest, this Court said in regard to Section 5 of the Act "* * * *its evident purpose was to secure to them the lands they had contracted for* * * *" without, however, attempting "to relieve any one whose transactions with the railroad were not in good faith * * *" (p. 243). (Emphasis supplied.)

Until the instant case, the question of knowledge of the land's mineral value was of importance in construing Section 5 *solely* as one element of the definition of a good faith purchaser. The Department held in *Miller* v. *Tacoma Land Company*, 29 L.D. 633, 635 (1900), that a deed from the railroad created a presumption of good faith purchase which could be rebutted only by showing (a) absence of valuable consideration, (b) proved knowledge of the railroad's want of title at the time of purchase, or (c) proved knowledge of the mineral character of the land at the time of purchase. As to (c), the test of the good faith of a

purchaser under Section 5 was clearly stated in *Hutton et al.* v. *Forbes*, 31 L.D. 325, 329 (1902) in the following language:

> "* * * Mineral lands being expressly excluded from the grant to the Southern Pacific Company, if the lands here involved were known to be mineral at the date of their purchase from the company by Baker it can not be held that he was a purchaser in good faith. *If they were not then known to be mineral lands, no subsequent discovery or development of minerals upon them could affect the question of the good faith of his purchase.*" (Emphasis supplied.)

The same principle was applied in *Clogston* v. *Palmer*, 32 L.D. 77 (1903), where Clogston protested issuance of an unrestricted patent to Palmer, a Section 5 purchaser, on the ground that at the time of the patent application the land was known to have mineral value. The Secretary of the Interior rejected this contention and said that the "known character of the land *at the date of the purchase from the company* is * * * the determining factor in any controversy involving the character of the land applied for under the provisions of said section" (p. 82). (Emphasis supplied.) He held that to except lands from patent under Section 5 "*it must appear that the lands were of known mineral character at the date of the sale by the land-grant company* and therefore were such that the purchaser should have known at the time of his purchase that they were excepted from the grant to the railroad company" (p. 82). (Emphasis supplied.)

This rule has been followed by the Department up to the time of the present case.[4]

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[4] In the *Alabama Company* (Montgomery, Ala., Serial No. 011501, unpublished decision dated April 17, 1924) the Secretary stated that "where lands, otherwise within Sec. 5 of said act, and not known to be *mineral* at the time of purchase by the [*bona fide* purchaser] are subsequently found to be *mineral*, they are not for that reason excepted from the right to purchase granted by said section." (Emphasis supplied) The unpublished decision re-

The effect of the decision of the court below is that the Mineral Act of 1914, *supra*, modified Section 5 of the 1887 Act, *supra*, so as to carve out of all Section 5 lands to which a final patent had not been issued at the date of the passage of the 1914 Act, a special reservation of the six minerals named in that Act (i.e., phosphate, nitrate, potash, oil, gas and asphaltic minerals). Under the decision below, any of the six minerals named in the 1914 Act, even on Section 5 lands, become available to the general public for leasing under the Mineral Leasing Act of February 25, 1920, as amended by the Act of August 21, 1935, *supra*.

By the Mineral Leasing Act of 1920, as modified by the Act of 1935, *supra*, the first person to file an application for a non-competitive mineral lease on the land is given a preference. Thus, the effect of the decision below is to attribute to Congress an intention to modify Section 5 of the Act of 1887, so as to favor third party interlopers over *bona fide* purchasers where the third party interlopers are the first to file an application for a non-competitive mineral lease. So interpreted, the law puts a premium on

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ferred to *Hutton et al.* v. *Forbes, supra,* and *Clogston* v. *Palmer, supra,* as authority for this rule.

In *John W. Stanley* (Phoenix, Arizona, Serial No. 072500, unpublished decision dated January 19, 1933) it was again stated that "where land otherwise coming within the provisions of section 5 of the act of March 3, 1887, and not known to be *mineral* in character at the time of purchase from the railroad company is subsequenty found to be *mineral*, it is not for that reason excepted from the right to purchase granted by the said section 5". The cases of *Hutton et al.* v. *Forbes* and *Clogston* v. *Palmer* were again cited in support of this rule.

The court below pointed out that the *Alabama Company* and the *John W. Stanley* cases apparently involved minerals other than those named in the 1914 Act. It seems clear, however, that the decisions in those two cases did not turn on the *kind* or *type* of minerals involved, since the Department used, in each instance, the general term *"mineral"* rather than the name of the particular mineral involved. If the decisions had turned on the *type* of mineral involved, the Department would have specified, in each case, the mineral involved and would have emphasized that it was not one of those included in the 1914 Act.

the sharp-shooter who is alert enough to follow the settlement of railroad land grants, search titles for flaws and file for mineral leases on lands excluded from the operation of such grants, while, at the same time, penalizing *bona fide* purchasers such as Anderson and others similarly situated, usually farmers and old settlers, who have bought lands in good faith and have occupied and paid taxes on the property for years.

The decision below is contrary to the entire purpose and background of the Act of 1887. The Mineral Act of July 17, 1914, *supra,* fails to mention in any way the 1887 Act. If Congress had intended to modify the rights conferred upon a *bona fide* purchaser by the 1887 Act, it would certainly have so stated in clear and unambiguous terms. In the absence of a clearly expressed intention to modify the 1887 Act, the broad remedial terms of that Act should take precedence over the 1914 Act which, as the court below notes, "was intended to be an extension of patent rights". (App. 36).

It is highly significant that the Departmental Instructions of February 13, 1889, promulgated under the 1887 Act, have never been changed or withdrawn (R. 96-97). They inform the Section 5 applicant that if he meets certain requirements, he will receive a fee simple patent. There is no statement or intimation that any subsequently enacted statute modifies his right to a fee simple patent so as to make his right to such patent, in the event the land is found to be mineral in character after the *bona fide* purchase but before the issuance of a patent, depend upon the *type* of mineral contained in the land.

In *Clogston* v. *Palmer, supra,* the Department had occasion to consider a question analogous to the question here involved and arrived at a conclusion diametrically opposite to the conclusion of the lower court in this case. In that case, one of the questions involved was whether Section 24 of the Act of March 3, 1891 (26 Stat. 1095, 1103), authorizing the President to turn public forest-bearing

lands into public reservations, modified the rights previously conferred on *bona fide* purchasers by Section 5 of the 1887 Act. In that case, the Department stated (32 L. D. at 83):

> "At the time, however, of the enactment of section twenty-four of the Act of March 3, 1891, the right conferred by section five of the act of March 3, 1887, was an existing right, hence the provisions of section twenty-four should not be construed to affect injuriously or take away such right unless the intention to do so is clearly expressed (Sutherland, Stat. Const. Sec. 481). There is nothing in the section from which it may be inferred that Congress did intend that the right previously conferred by said section five should be disturbed."

The decision of the court below determines for the first time a very important question of Federal land law in a manner which, in effect, destroys the rights of a large number of innocent persons who are now holding and occupying land under apparent good fee simple titles originally acquired from land grant railroads for value, and who are ignorant of the fact that their land was not actually included in the final settlement of the railroad grants. The decision produces an extremely harsh result, contrary to the remedial purpose of the 1887 Act. Many unsuspecting persons whose rights will be affected by the decision of the court below are unaware of their danger and will doubtless, like Anderson in the instant case, first learn of the defect in their title when some third party speculator, gambling on future mineral discovery, pays a nominal fee and files a claim for mineral or other rights in their land. The question is one of first impression, is of great importance to the many persons who may ultimately find themselves in the situation of these petitioners, and should be considered and settled by this Court.

II. The decision of the court below is in conflict with the decision of this Court in *Wyoming, et al.* v. *United States, supra,* and the numerous older cases relied upon and cited

therein. That decision holds that full equitable title passes to a patent applicant under a non-mineral land statute when he has complied with all of the requirements of the statute under which he claims and the regulations promulgated thereunder, *if the land is not then known to be valuable for minerals.*

Relying on the *Wyoming* case, *supra*, and the cases cited therein, petitioners argued alternatively in the court below that even if the Mineral Act of July 17, 1914, *supra*, were held to have modified Section 5 of the 1887 Act, *supra*, nevertheless, they were entitled to a fee simple patent, because Anderson had completed his proof, paid the money to the Land Office and done all of the other things required by the applicable law and regulations *prior to the time that there was any suspicion or suggestion that the land might contain minerals.*[5]

Under the long established general rule, reaffirmed by this Court in *Wyoming, et al.* v. *United States, supra*, an applicant's right to a patent depends solely upon what he, the applicant, does. He becomes vested with full equitable title by virtue of his actions and his actions alone, and by neither action nor inaction can the Secretary or any inferior officer prevent equitable title from vesting.

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[5] It has always been possible under a non-mineral land statute to obtain full legal title to land which is subsequently found to be valuable for minerals. Even a land grant railroad acquired full legal title to mineral land if it was not known to be mineral in character at the time that the patent was issued. Until the instant case, an applicant under Section 5 of the 1887 Act was able to acquire title to mineral land if the land was not known to be mineral in character at the time of the *bona fide* purchase. The applicant under a general non-mineral land statute was able to acquire full legal title to mineral land if it was not known to be mineral in character at the time that the applicant complied with the applicable statute and regulations.

Respondent argued below that the rule relating to patent applicants under Section 5 of the 1887 Act was changed by the Mineral Act of July 17, 1914 and that knowledge of the land's mineral character *at any time before actual issuance of a patent* was sufficient to deprive Anderson of his right to a fee simple title.

The time when the applicant's right to a fee simple patent comes into full fruition is determined solely by *when he acts*, and not by when the Secretary or an inferior officer recognizes that he has acted. No action of the Secretary can deprive such an applicant of his right to a fee simple patent unless it is found that:

> (a) the applicant did not *in fact* meet all the requirements for a patent under the applicable statute and regulations. *Wilbur* v. *U. S. ex rel. Stuart*, 60 App. D.C. 299, 53 F. (2d) 717 (C.A.D.C. 1931); or
>
> (b) the land was known to be valuable for minerals *before* the applicant complied with all the requirements for a patent. *Wyoming, et al.* v. *United States, supra*, 255 U.S. at 501-502.

The Secretary may affirm or reverse the conclusions of an inferior officer with respect to either (a) or (b) above, *but that is the limit of his supervisory authority.* The power of the Secretary and the other supervisory officers to deny an application for a patent under a non-mineral land statute, is summarized by the court in *Leonard* v. *Lenox*, 181 Fed. 760 (C.C.A. 8, 1910), and quoted with approval by this Court in *Wyoming, et al.* v. *United States, supra*, as follows (255 U. S. at 499):

> " * * * In Leonard v. Lennox, 104 C.C.A. 296, 181 Fed. 760, a contention that an application for a nonmineral final entry, even if regularly presented, and based on full compliance with the law, should be disallowed and rejected where the land subsequently is discovered to be mineral (coal), was overruled by the circuit court of appeals of the eighth circuit, the court saying, p. 764: 'This insistence cannot prevail. It not only is opposed to the settled rule that the character of the land—whether agricultural or known to be chiefly valuable for coal—must be determined according to the conditions existing at the time when the applicant does all that he is required to do to entitle him to a patent, but is grounded in a misapprehension of the authority and duty of the officers of the Land Department in respect of such an application. *Whilst it undoubtedly is*

subject to examination and consideration by them, this is not that they may elect whether or not they will consent to its allowance, but that they may ascertain whether or not the applicant has acquired a right to its allowance,—a right which is acquired, if acquired at all, at that point of time when the applicant has done all that he is required to do in the premises instead of at the time of its recognition by them.' * * *"*
(Emphasis supplied.)

In the *Wyoming* case, *supra,* this Court pointed out that the one exception to the general rule regarding the vesting of full equitable title under a non-mineral land statute is the principle laid down in *Barden, et al.* v. *Northern Pacific Railroad Co.,* 154 U. S. 288 (1894). In the *Barden* case, a *railroad company* applied for a patent to land granted to it under a *railroad land grant statute* which, like most other railroad land grant acts, specifically excluded mineral lands. After the railroad company had met all the requirements for a patent but before patent was actually issued, the land was found to be valuable for minerals. This Court held that the discovery of minerals at any time before the actual issuance of a patent *to the railroad company* by the Secretary was sufficient to prevent *the railroad company* from obtaining title.

It is clear from this Court's opinion in the *Barden* case that the exception to the general rule regarding the vesting of full equitable title was intended to apply only in a case where: (1) the patent applicant is a *railroad company;* (2) applying under a *railroad land grant statute* for a patent to land included in the railroad land grant; and (3) mineral is discovered on the land prior to the issuance of a patent by the Secretary. All of these facts must be present in order for the *Barden* exception, rather than the general rule, to apply. In *Wyoming, et al.* v. *United States, supra,* this Court discussed the *Barden* decision and was careful to point out that the principle of that case was limited to patents applied for by railroad companies under

railroad land grants and to no other grants, stating (255 U. S. at 507-508):

> "The only exception to the general rule before stated respecting the time as of which the character of the land—whether mineral or nonmineral—is to be determined is one which, in principle and practice, is confined to railroad land grants. From the beginning the Land Department, by reason of the terms of those grants and the restrictive interpretation to which they are subjected, uniformly has construed and treated them as requiring that the character of the land be determined as of the time when the patent issues. • • • As the opinion in that [the *Barden*] case shows, the court recognized that the mineral land exception in other land laws simply operates to exclude from sale, etc., 'land known at the time to be mineral', and was careful to explain that its decision related to 'grants in aid of railroads', and to 'no other grants'. • • • Plainly, the decision in that case is without bearing here, save as it recognizes that rights under other land laws are to be tested by a different rule. • • • "

In *Kern Oil Co., et al.* v. *Clarke*, 30 L. D. 550 (1901), cited with approval by this Court in the *Wyoming* case, the Department also distinguished the *Barden* case exception from the general rule, stating (30 L. D. at 563):

> " • • • Manifestly, the principles announced in that [the *Barden*] case were intended to be controlling only in the administration of railroad land grants • • • which are to be strictly construed against the grantee [i.e., the railroad company] and in favor of the government. • • •
>
> "It was not intended by the decision in the *Barden* case to overrule or in any manner interfere with the principles enunciated in numerous earlier decisions, as we have seen, with respect to *purchases and entries made under the laws relating generally to the disposal of the public lands.* Those principles still prevail in all their original force and effect, and they have been frequently recognized by the Supreme Court since the decision in the *Barden* case." (Emphasis supplied).

Obviously, the "grantee" under a railroad land grant is the railroad company, not a Section 5 *bona fide* purchaser from a railroad company or his successors in title.

The court below rejected petitioners' contention that full equitable title had vested in Anderson on October 26, 1936 when he had complied in full with the requirements of the applicable law and regulations, the land not then known to be valuable for minerals. The court below held that the general rule regarding the vesting of equitable title set forth by this Court in the *Wyoming* case, *supra*, was not applicable to the instant cause, but that Anderson's rights were governed by the exception to the general rule laid down by this Court in the *Barden* decision, *supra*. The conclusion of the court below on this point is set forth in the following excerpt from its opinion (App. 43):

> "Appellants rely strongly upon Wyoming v. United States. That case involved a selection of lieu lands in an exchange, and no patent was provided for in the arrangement. The Court held that the Secretary was required to pass upon the selection list as of the time it was submitted. *But the Court expressly pointed out that the rule was different as to the determination of the mineral or non-mineral character of lands in railroad grants. That determination is to be made as of the time the patent issues.* The Court cited and discussed Barden v. Northern Pacific R. R. Co., supra, and inferentially in the strongest fashion reaffirmed it. * * * " (Emphasis supplied)

From the foregoing excerpt, it is apparent that the court below considered that a patent to the land here involved was sought by Anderson *under a railroad land grant statute*. This is not correct. The land in question was originally included within a railroad land grant, but actually was excluded from the operation thereof. The mere fact that a land grant railroad company had sold the land to Anderson's predecessor in title does not mean that the land was acquired under the land grant where it was not listed for patent by the railroad prior to the closing of the grant.

If the land had been included in the operation of the grant, Anderson would have had a perfect title to the land including all mineral rights, since there was no suggestion or intimation of any kind that the land was valuable for minerals at the time the land grant was closed in 1930. The difficulty in which these petitioners find themselves stems from the very fact that the land here involved was excluded from the operation of the railroad land grant. In the instant case, the court below erroneously applied the rule of the *Barden* case, *supra*, because the land "was within the geographical limits of a grant to a railroad" and the land was reported to be valuable for minerals prior to the issuance of a patent (App. 43). The court below completely ignored the fact that the other two requirements for the *Barden* rule to apply were not present in the instant cause. Anderson was a *bona fide purchaser* for value applying *under Section 5 of the 1887 Act*, not a *railroad company* applying under a *railroad land grant statute*, so that the general rule regarding the vesting of equitable title should have been applied to Anderson, rather than the *Barden* exception to the general rule.

The decision of the court below is not only contrary to and in conflict with the general rule regarding the vesting of equitable title laid down by this Court in the *Wyoming* case, *supra*, but is also a misapplication of the exception to the general rule laid down by this Court in the *Barden* case, *supra*. For this reason, in addition to the reason previously cited, this Court should consider this cause and settle the issues involved herein.

III. The decision below affirms a test as to the mineral or non-mineral character of the land which places an impossible burden of proof on a patent applicant under Section 5 of the 1887 Act, *supra*, and which is in conflict with the tests approved by this Court in *United States* v. *Southern Pacific Company, et al.*, 251 U.S. 1(1919). Likewise, the test affirmed by the court below is in conflict with the test laid down by Congress in the Leasing Act of 1920, as

amended by the 1935 Act, *supra*, and with the regulations promulgated on January 19, 1935, by the Department of the Interior in Circular No. 1344, entitled "Procedure on Geological Survey's Report on Oil and Gas", 55 I.D. 120 (R. 99-100).

In the Leasing Act of 1920, as amended by the 1935 Act, *supra*, Congress provided that a non-competitive oil and gas lease should be issued to an applicant where the land is not within any known geological structure of a producing oil or gas field (App. 50). The Department's regulations, Circular No. 1344, *supra*, provide that (R. 99):

> "Where the Geological Survey *reports* that land embraced in a nonmineral entry or claim *on which final proof has not been submitted or which has not been perfected* is in an area in which valuable deposits of oil and gas may occur because of the absence of reliable evidence that the land is affected by geological structure unfavorable to oil and gas accumulation, the entryman or claimant will be allowed 30 days from notice to furnish consent under the act of July 17, 1914 (38 Stat. 509), or to apply for reclassification of the land as nonmineral, submitting a showing therewith, and to apply for a hearing in event reclassification is denied, or to appeal. He must be advised that if a hearing is ordered the burden of proof will be upon him, and also that if he shall fail to take one of the actions indicated, his entry or claim will be canceled." (Emphasis supplied)

However, the same regulations provide for a different rule where a patent applicant has submitted final proof or perfected his claim, and the Geological Survey *thereafter* submits a mineral report, as it did in the instant case. The rule to be applied in that event is indicated by the following excerpt from Circular No. 1344 (R. 99-100):

> *"In a case where acceptable final proof has been submitted,* or a claim has been perfected, and the Geological Survey *thereafter makes report, as in the above or similar form,* such report will not be relied upon as basis for adverse proceedings against the entry or claim unless *the Government is prepared to assume the*

burden of proving prima facie, that the land was known to be of mineral character, at the date of acceptable final proof or when the claim was completed, according to the established criteria for determining mineral from nonmineral lands, among which may be those recognized by the Supreme Court in the case of *United States* v. *Southern Pacific Company et al.* (251 U.S. 1). If the Government is thus prepared to assume such burden of proof, the General Land Office will institute adverse proceedings against the entry or claim, making a charge to that effect, giving the entryman or claimant the option of refuting the charge in accordance with regulations in force, Circular No. 460, 44 L.D. 572, or of consenting to the reservation of the oil and gas to the United States, and thereby avoiding the expense of litigation. The entryman or claimant will be advised that in the event hearing is had, the burden of proof will be upon the Government; also, that if he shall fail to make answer or to exercise the option offered him within the time allowed, the entry or claim will be canceled without further notice." (Emphasis supplied.)

In the instant cause, no report of any nature had been requested from or issued by the Geological Survey at the time that Anderson perfected his claim, namely, October 26, 1936. Subsequently, on July 22, 1937, the Geological Survey reported *for the first time* that "the land referred to is in an area which may contain accumulations of oil or gas under favorable structural conditions." (R. 22-23, 84).

Thereupon, in violation of its own regulations, the Department of the Interior called upon Anderson to submit proof of the nonmineral character of the land in question (R. 84-85). He submitted considerable evidence in an attempt to prove this general negative. The matter was again referred to the Geological Survey, which reported on August 31, 1940, that the evidence which Anderson had submitted did not "conclusively determine the non-oil and non-gas character of the land", in view of the fact that there were "producing wells some 8½ and 10 miles to the

northwest, 5 miles to the southeast and 6½ miles to the east" (R. 87).

After the General Land Office had reopened the file in 1946, it again asked the Geological Survey for a report and at that time, namely, September 6, 1946, the Survey stated that "no part of it (the land in question) is within the known geologic structure of a producing oil or gas field". (R. 24). On February 26, 1947, the Geological Survey issued a fourth report which was to the same effect as its third report (R. 24).

In the face of this vacillating position on the part of the United States Geological Survey, an agency which is staffed with specialists whose business it is to study and follow the discovery and production of oil and gas, the court below has affirmed a test which requires the simple farmer, who has occupied and tilled the land for half a century, to assume an impossible burden of proof in order to prevent an interloper from obtaining oil and gas rights under his land for a nominal consideration. Such a situation was never intended by Congress. The best evidence of the intention of Congress is the test prescribed in the Leasing Act of 1920, as amended by the Act of 1935, *supra*, as a condition for the granting of a non-competitive oil and gas lease, namely, that the land not be "within any known geologic structure of a producing oil or gas field" (App. 50). The Department's own regulations in Circular No. 1344, *supra*, are to the same general effect and require the patent applicant to assume the burden of proving the non-mineral character of the land *only* where, prior to the completion of final proof, the Geological Survey has reported that the land may contain minerals (R. 99-100). Where such a report is made *after the patent claimant has completed his final proof*, as is the case here, the burden of proof is, by the Department's own regulations, placed upon the Government to show that the land was known to be mineral in character *at the time that the final proof was completed.* No such burden was ever assumed by the Gov-

ernment in the instant cause. Instead, it was illegally placed upon Anderson.

This is a problem which is of great general importance to all patent claimants under non-mineral land statutes, including all persons falling within the purview of Section 5 of the Act of 1887 who have not secured patents to the lands which they now hold and occupy in good faith. This question should be considered and settled by this Court.

CONCLUSION

For the reasons set forth herein, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11798

ROSE M. ANDERSON, ET AL., APPELLANTS

v.

DOUGLAS MCKAY, Secretary of the Interior, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided March 25, 1954

Mr. Warren Wood, with whom *Messrs. Charles B. McInnis* and *Roger H. Muzzall* and *Mrs. Irene Kennedy* were on the brief, for appellants.

Mr. John F. Cotter, Attorney, Department of Justice, with whom *Mr. Edmund B. Clark,* Attorney, Department of Justice, was on the brief, for appellee.

Before EDGERTON, WILBUR K. MILLER and PRETTYMAN, Circuit Judges.

PRETTYMAN, *Circuit Judge:* This was a civil action in the United States District Court for the District of Columbia, in which the plaintiffs, Anderson, *et al.,* sought an order directing the Secretary of the Interior to issue to them a patent for certain lands without reservation of mineral rights therein. The District Court granted summary judgment for the defendant Secretary.

The material facts are not in dispute, being largely stipulated. By Acts passed in the 1860's[1] Congress au-

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[1] 12 STAT. 489 (1862); 13 STAT. 356 (1864).

thorized an odd-section grant to a railroad of land within twenty-mile limits of its tracks. The land involved in the present action was a quarter-section within that grant. The railroad never sought or received a patent to this parcel. Nevertheless, in 1879, the railroad sold it to one Warren, from whom the title passed in chain of title to Charles J. Anderson in 1897 and from him to our present appellants, his heirs at law.

It happened that the situation just described occurred in many parts of the West, the railroads selling to unwary purchasers parcels of land within the boundaries of their grants but never patented. The practice became so widespread that in 1887 Congress passed an Act, called the Land Adjustment Act,[2] Section 5 of which provided:

> "That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: * * *."

Since 1897 Anderson and his heirs have been in open and exclusive possession of the land. They have occupied, fenced, farmed, and paid taxes on it continuously to the present time. The grant to the railroad was closed out in 1930, and this parcel was not listed under the grant. Thereafter it was shown on the tract books of the General Land Office as vacant.

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[2] 24 STAT. 556, 43 U.S.C.A. § 894 *et seq.*

On March 2, 1936, one Buckholts filed an application for a non-competitive oil and gas lease on this land under the provisions of the Mineral Leasing Acts of 1920 and 1935.[3] The 1920 Act authorized leases, and the 1935 Act gave a preference right to the first applicant for a lease of land not within any known geologic structure of a producing oil or gas field. On July 20, 1936, Anderson filed an application to purchase the tract under the above-quoted provision of the Act of 1887. On August 21, 1936, the Commissioner of the General Land Office held Anderson to be entitled to a patent without reservation of mineral rights, upon the payment of the required purchase price and the publishing of notice for the required time, and he denied the application of Buckholts. These rulings were in a document from which we shall quote later. Anderson proceeded to make the required payment and to publish the required notices. On September 18, 1936, Buckholts appealed to the Secretary of the Interior from the decision of the Commissioner. On October 26, 1936, Anderson completed his notices and perfected his right to the issuance of a patent pursuant to the terms of the ruling in his favor. On December 31, 1936, the Secretary reversed the decision of the Commissioner. He held that Anderson was entitled to a patent only with reservation of mineral rights to the United States and that Buckholts was entitled to a non-competitive oil and gas lease. The ground of the Secretary's ruling was that the Act of 1887 had been altered by an Act of 1914[4] and by the Acts of 1920 and 1935.

Reports concerning the mineral or non-mineral character of the land varied. In 1936 there was no indication that the land was mineral in character. On June 22, 1937, the Geological Survey reported that the land "is in an area which may contain accumulations of oil or gas under

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[3] 41 STAT. 437, as amended, 30 U.S.C.A. § § 181, 193, 201; 49 STAT. 676, 30 U.S.C.A. § 226.

[4] 38 STAT. 509, 30 U.S.C.A. § § 121-123.

favorable structural conditions and offers an opportunity for prospecting operations to determine the nature and worth of the structural features affecting it. Accordingly, it is reported as having a prospective value for oil and gas within the intent of paragraph 12(c) of the Oil and Gas Regulations." On August 11, 1939, the Secretary advised Anderson that a lease would be issued to Buckholts unless Anderson made an affirmative showing that the land was non-mineral. Anderson attempted to make such a showing, but the Geological Survey held that he had not met the burden. For undisclosed reasons, in 1946 the Geological Survey reported to the General Land Office that no part of the land in question "is within the known geologic structure of a producing oil or gas field." The General Land Office requested another report, and the Geological Survey, on February 26, 1947, iterated that the land was not within the known geologic structure of a producing oil or gas field. On May 1, 1947, the Secretary issued an oil and gas lease to Buckholts, which was assigned by him to the Central Commercial Company.

We examine the rights of the Andersons as of three critical points of time. One such time was when Warren, their predecessor in title, bought the land from the railroad, *i.e.*, in 1879. Another was in the year 1914, after Anderson's purchase in 1897. And the third was when Anderson completed compliance with the terms laid down by the Land Office for a patent, *i.e.*, on October 26, 1936.

The rights of the railroad in the land were prescribed by the Act of 1862, amended in some respects by the Act of 1864. Those Acts dealt with two distinct and different steps—the grant and the patents. The Acts themselves made the grant. The language of Section 3 of the 1862 Act was "That there be, and is hereby, granted to the said company * * * every alternate section of public land, designated by odd numbers, to the amount of five [changed by the 1864 Act to ten] alternate sections per mile on each side of said railroad, on the line

thereof, and within the limits of ten [changed by the 1864 Act to twenty] miles on each side of said road". Thus the grant was to the odd-numbered sections of land within twenty miles on each side of the railroad tracks. But the tracks were not then built; they were not even located on paper. The Act dealt with the whole line of the Union Pacific Railroad Company, which began in Nebraska and ended at the western boundary of the Nevada Territory and included Iowa and Missouri branches, and the line of the Central Pacific Railroad from the Pacific Coast to the eastern boundary of California. The Act provided (Section 7) that within two years after the passage of the Act (extended one further year by the 1864 Act) the companies should designate "the general route of said road, as near as may be". So, while the grant was to a vast strip of land, part of an area two thousand or more miles long and forty miles wide, it was not then known, and could not then be known, to what land it actually applied.

The grant did not include mineral lands. The statutes expressly provided that mineral lands were excepted from the grant. The 1862 Act provided "That all mineral lands shall be excepted from the operation of this act". The 1864 Act, without deleting the exclusion of mineral lands in the 1862 Act, added this proviso: "And any lands granted by this Act, or the act to which this is an amendment, shall not * * * include any * * * mineral lands, * * *." Thus the railroads had no grant of mineral lands.

The 1862 and 1864 statutes provided that as each forty miles of railroad were completed three commissioners appointed by the President should inspect them and, upon their certificate, patents to the granted sections on each side of the completed strip of track would issue to the railroad. Those patents conveyed the fee simple title to the land. The language of the 1862 statute was: "* * *

patents shall issue conveying the right and title to said lands to said company * * *.'"[5]

The foregoing features of the statutes gave rise to litigation and consequent decisions of the Supreme Court. *Barden* v. *Northern Pacific R. R.*[6] concerned mineral land which was within the geographical limits of a grant to a railroad, identical in all material respects with the grant in the case before us. The land had been entered by Barden as mineral land, quartz lodes having been located on it long after the grant. No patent had issued. The Court held that the specific exception of mineral lands in the statute, being unconditional, applied to mineral lands as such whether known to be so or not. The Court made vivid its view by depicting the different situation which would have existed had a patent been issued. The process of passing upon an application for a patent, said the Court, involved a determination by authorized Government officials that the land was non-mineral and patentable.[7] After a patent, conveying fee simple title upon that determination, the Government would be estopped from contending to the contrary, absent fraud, the Court said.[8] The Court concluded: "The plaintiff in this case not having a patent, and relying solely upon its grant, which gives no title to the minerals within any of its lands, shows by its complaint no cause of action for the possession of the mineral lands claimed.'"[9]

In the case at bar the railroad could convey only that which it had. Therefore, when it purported to convey to

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[5] Sec. 4, 12 STAT. 492.

[6] 154 U.S. 288, 38 L. Ed. 992, 14 S. Ct. 1030 (1894).

[7] See also West v. Standard Oil Co., 278 U.S. 200, 73 L. Ed. 265, 49 S. Ct. 138 (1929); Davis v. Wiebbold, 139 U.S. 507, 35 L. Ed. 238, 11 S. Ct. 628 (1891); 36 AM. JUR., Mines and Minerals §§ 13-14, and cases there cited.

[8] And see Deffeback v. Hawke, 115 U.S. 392, 29 L. Ed. 423, 6 S. Ct. 95 (1885).

[9] *Supra*, 154 U.S. at 332, 38 L. Ed. at 1003.

Warren in 1879, it could not, and so did not, convey mineral lands. Should the land eventually prove to be mineral land, it was not within the grant to the railroad[10] and hence was not conveyed by it to Warren.

As we have pointed out, this practice of the railroads—selling land which they did not have—became so prevalent that in 1887 Congress passed the Act, from which we have quoted, to remedy the plight of the purchasers. It authorized the issuance of patents to such purchasers. The patent, if obtained, would convey to the patentee the title which he had not received by his deed from the railroad, and, moreover, the patent would erase flaws or omissions which inhered in the grant to and the conveyances from the railroad. So after 1887 Warren's successors in the line of conveyance had a right to secure a patent to the land. They did not secure one.

The Andersons' case rests in large part upon their view of the 1887 Act. They maintain that it gave Anderson's predecessor in title and him an indefeasible right to an unrestricted fee simple title. But the statute did not go that far. It gave Anderson a right to apply for and obtain a patent. But it was an inchoate right.[11] Congress could have repealed the statute, and if it had done so all unexercised rights to patents under it would have disappeared. In respect to that statute the Supreme Court held in *Ramsey* v. *Tacoma Land Co.*:[12] "Obviously the statute is not a curative one, confirms no title, but simply grants a privilege."

This brings us to Anderson's situation in the year 1914. He had acquired by virtue of his purchase in 1897 only that which the railroad had had under its grant, and so he had acquired by that deed no land which was mineral land; and, if all the land purportedly thus conveyed was

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[10] Barden v. Northern Pacific R. R., *supra*.

[11] See Clogston v. Palmer, *infra*.

[12] 196 U.S. 360, 363, 49 L. Ed. 513, 514, 25 S. Ct. 286 (1905).

mineral land, he had acquired nothing in fee simple. He had acquired, however, by virtue of his deed and by virtue of the 1887 Act of Congress, a right to secure from the Government a patent. But by 1914 he had not applied for a patent or complied with the terms of the grant of the right to obtain one. He had not exercised the right Congress had given him.

In the early acts relating to public lands Congress had treated mineral and non-mineral lands by different methods. Patents could be obtained for non-mineral lands under provisions of law which, as amended, now appear in Title 43 of the United States Code, particularly at Sections 161 *et seq.* Mineral lands were specifically excepted from those provisions.[13] Patents for lands in which valuable mineral deposits were found could be obtained under provisions of law which, as amended, now appear in Title 30 of the Code, particularly in Sections 22 and 29.[14] Whether land with both characteristics should be treated as mineral or as non-mineral depended upon which of its values was the greater.[15] In 1914 Congress introduced a new concept into the treatment of lands reported to be valuable for certain specified minerals—phosphate, nitrate, potash, oil, gas, or asphaltic minerals.[16] It provided that such land could be entered or purchased and then patented under the non-mineral land laws, but with a reservation to the Government of those minerals. It provided that, if a person had theretofore in good faith purchased or entered land under the non-mineral land laws and the land was subsequently found to be valuable for the specified minerals, such a person could get a patent for his land but with a reservation to the Government of those minerals. It is clear enough that

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[13] Rev. Stat. § 2302, 43 U.S.C.A. § 201.

[14] As to oil see Act of Feb. 11, 1897, 29 Stat. 526.

[15] Davis v. Weibbold, 139 U.S. 507, 35 L. Ed. 238, 11 S. Ct 628 (1891).

[16] *Supra* note 4.

this 1914 Act contemplated land as to which no patent had theretofore been issued. It made no attempt at forfeiture of issued patents and made no reference to another, or a second, or an amended, patent. So, if Anderson had exercised prior to 1914 the right which he and his predecessors had had since 1887, he would not have been affected by the 1914 Act.

It is also clear that, even though basically the 1914 Act was intended to be an extension of patent rights, it also actually restricted patent rights theretofore existing in respect to many lands patentable either as mineral or as non-mineral lands. In terms it was all-inclusive as to lands reported as valuable for the specified minerals. It applied in terms to "Any person who has, in good faith, located, selected, entered, or purchased". It said that such a person "may, upon application therefor," receive a patent, but with a reservation to the United States of the named minerals. In the face of these unqualified provisions we do not see how we could by construction write an exception into the statute. We cannot except from its terms applicants for patents under the 1887 Act when Congress has not done so.

We think this situation not unlike that considered by this court in *West Coast Exploration Co.* v. *McKay*, decided January 26, 1954. There Congress in 1855 had given the Gerard heirs a right to enter public lands to be selected by them. But no selections were made by them until 1947, when the holder of the land "scrip" selected land containing minerals, *i.e.*, deposits of sodium and calcium borates. By that time the Mineral Leasing Acts had been passed and other withdrawals made of lands containing those minerals. We were compelled to hold that the selection was too late.

So in this case, so far as the 1914 Act is concerned, we think it sharply restricted all patent rights which had theretofore existed, but had not been exercised, in respect to lands reported to be valuable for certain mineral deposits.

In 1920 Congress moved forward in its treatment of certain minerals in the public lands. Instead of the acquisition of rights by location and subsequent patent, it provided that deposits of coal, phosphate, sodium, potassium, oil, oil shale, and gas could be leased.[17] It provided that the named deposits could be disposed of by the Government only in the manner provided by that Act. It contained an exception—"except as to valid claims existent on February 25, 1920".[18] The Andersons would make this exception an indication of the continued validity of their right in its original form. But, even if the 1887 right could be deemed to be a "claim" under the mineral law, which we doubt, the application of the exception in the 1920 Act would afford the Andersons no benefit. It would except them from operation of the leasing act but would not remove them from the reservation requirement of the 1914 Act in respect to a patent.

The Andersons say that until the decision in the present case the Interior Department had consistently followed a rule, established in two cases in 1902[19] and 1903,[20] that the transferees of a bona fide purchaser under the 1887 Act are entitled to a fee simple patent if the land was not known to be mineral in character at the time of the original purchase from the railroad. They say that, while the Department has never expressly stated that the 1914 Act does not modify rights under the 1887 Act, it has never expressly stated the contrary. They contend that the conclusions reached by the Department in three cases, *The Alabama Company*,[21] *Sarah Barton*,[22] and *John Stanley*,[23] are clearly premised upon the assumption that

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[17] 41 STAT. 437, as amended, 30 U.S.C.A. § § 181, 193, 201.

[18] 41 STAT. 451, as amended, 30 U.S.C.A. § 193.

[19] Hutton v. Forbes, 31 L.D. 325.

[20] Clogston v. Palmer, 32 L.D. 77.

[21] Montgomery, Ala., Serial No. 011501, decided April 17, 1924.

[22] G.L.O. 03052, Patent No. 1045134 issued March 26, 1931.

[23] Phoenix, Ariz., Serial No. 072500, decided Jan. 19, 1933.

rights under the 1887 Act were not modified by the 1914 Act.

A problem concerning mineral land was inherent in the 1887 Act. For some reason not now apparent, it did not arise quickly. The statute prescribed that to get a patent the purchaser from the railroad must be a "bona fide" purchaser. A person who bought from a railroad land then known to be mineral would be presumed to have known that the railroad had no grant of that land; he would not be a bona fide purchaser. In 1903 the Interior Department faced this problem and decided it. In *Clogston* v. *Palmer*[24] land was purchased from a railroad. Thereafter, but before the purchaser applied for his patent, it became known that the land contained minerals. The issuance of the patent was protested, but the Department ruled that, since the mineral character of the land was not known at the time of the purchase from the railroad, the purchaser was a bona fide purchaser, that therefore the 1887 Act applied to him and he was entitled under that Act to a patent. The Department adhered to that view in a number of other cases.

The Andersons say that since 1914 the Department has consistently relied upon and followed its decision in *Clogston* v. *Palmer* and has in at least three cases issued unrestricted patents to applicants under the 1887 Act. They maintain that this amounts to a long-continued administrative construction that the 1914 Act did not affect the 1887 Act or the rights granted thereunder. We have examined carefully the cases they cite.

In 1924 the Department had before it an application of *The Alabama Company, supra,* filed under the 1887 Act. This Company had a title derived through mesne conveyance from a railroad to which a grant had been made. The lands were the numbered sections prescribed by the grant, but they were excepted from the operation of

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[24] *Supra* note 20.

the grant because the railroad was never built. The granting act, an act of June 3, 1856,[25] contained no reservation of mineral lands, and in that respect it differed from the Acts of 1862 and 1864 which are before us in the present case. Somewhere along the line in the *Alabama* case there had been separate conveyances of mineral interests, and so the question was presented whether a patent under the 1887 Act could or could not include minerals. The Department ruled consistently with the *Clogston* decision, citing it. But nothing in the record indicates that the land contained any of the minerals listed in the 1914 Act, and in fact several references indicate that coal and iron were the minerals involved. The patent was issued to The Alabama Company.

In 1931 the Department had before it an application of one *Sarah Barton, supra,* to purchase under the 1887 Act. She filed an affidavit reciting that the land was "essentially nonmineral" and that it did not contain any known oil or any valuable mineral other than iron or coal. The patent was issued, and no reference was made to the subject of minerals.

In 1933 the Department had before it an application of one *John Stanley, supra,* for a patent under the 1887 Act. One Ross, an entryman under the Stock Raising Homestead Act, protested the grant of Stanley's application on two grounds, one of which was that the land was mineral in character and that mineral land could not be acquired under the 1887 Act. The Department ruled in reliance upon the *Clogston* decision, citing it. But the record in the case shows that the mineral deposits were gold, silver and copper.

The 1914 Act treated, as we have shown, land which contained certain specified minerals. There is nothing in any of the cases cited to show that the lands there involved were thought to be valuable for phosphate, nitrate, potash, oil, gas or asphalt, the minerals specified in the Act.

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[25] 11 STAT. 17.

It is difficult to determine from the authorities the precise rule as to the effect to be given long-continued administrative construction of a statute. Expressions of the Supreme Court vary all the way from "pertinent",[26] "ha[s] weight",[27] and "entitled to persuasive weight"[28] to "ought not to be overruled without cogent reasons."[29] But, however that may be, it is certain that to be given any effect an administrative construction must have been a ruling which can reasonably be held to have decided the point presently in issue.[30] The rulings cited to us by appellants did not actually deal with the effect of the 1914 Act on the 1887 Act, either in fact or in language. It is impossible, therefore, for us to say that those rulings constituted an administrative determination upon the point or an administrative construction of the statutes.

We come now to Anderson's situation in October, 1936. The sequence of events was as follows: The railroad grant was "adjusted and closed" in 1930. Anderson's land was never listed under the grant. In 1935 Congress amended the Mineral Leasing Act (the Act of 1920) and included a provision that after August, 1935, the first qualified person to make an application for a lease of lands not within any known geologic structure of a producing oil or gas field should be entitled to a preference right over others to a lease without competitive bidding at a statutory royalty. On March 2, 1936, Buckholts made an application for such a lease of the oil and gas deposits on the land covered by

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[26] Great Northern Ry. v. United States, 315 U.S. 262, 275, 86 L. Ed. 836, 62 S. Ct. 529 (1942).

[27] Armstrong Co. v. Nu-Enamel Corp., 305 U.S. 315, 330, 83 L. Ed. 195, 59 S. Ct. 191 (1938).

[28] Billings v. Truesdell, 321 U.S. 542, 553, 88 L. Ed. 917, 64 S. Ct. 737 (1944).

[29] Heath v. Wallace, 138 U.S. 573, 582, 34 L. Ed. 1063, 1068, 11 S. Ct. 380 (1891). See also Brewster v. Gage, 280 U.S. 327, 336, 74 L. Ed. 457, 50 S. Ct. 115 (1930).

[30] Estate of Sanford v. Commissioner of Internal Revenue, 308 U.S. 39, 84 L. Ed. 20, 60 S. Ct. 51 (1939).

Anderson's deed. On July 20, 1936, Anderson made an application for a patent to the land without reservation of mineral rights. On August 21, 1936, the General Land Office, over the signature of its Assistant Commissioner, approved Anderson's application and rejected Buckholts's. The precise holding of this document is critical to the controversy, and so we quote the concluding portion in full. It said:

> "Anderson is allowed a period of 90 days from receipt of notice hereof within which to make the said payment of $200.00 and to forward the evidence of publication. If he does not comply herewith or appeal herefrom within the time allowed, his application G. L. O. 06488 will be rejected, subject to the right of appeal. If he makes the payment and forwards the evidence as above required, further action will be taken on the application with a view to issuing patent thereon in the absence of objection.
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> "A right to purchase under Sec. 5 of the act of March 3, 1887, carries with it the right to minerals in the land, provided the original purchaser from the beneficiary of the grant did not know of the mineral character of the land at the time of such purchase. 32 L.D. 77: 31 L.D. 325. There is no evidence of such knowledge of mineral character on the part of Albert E. Warren, the original purchaser. As Anderson under his application would have a right to any oil and gas discovered, Buckholts can gain nothing from his lease application 06362, being for oil and gas which would, if discovered, actually be Anderson's.
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> "Accordingly, Buckholts' Application 06362 is hereby rejected, subject to the right of appeal. If Buckholts does not file an appeal in this office within thirty days from receipt of notice hereof, the rejection of his application will be made final and the case closed in relation thereto without further notice. Copy of appeal should be served on Anderson, and evidence of such service should be filed here."

From that quotation we note that the right of Anderson to an unrestricted patent and the right of Buckholts to a

mineral lease were treated as mutually exclusive (as indeed they were); that Anderson was not told that his application was or would be approved if he complied with the specified terms, but rather that if he did so "further action" would be taken on the application with a view to issuing a patent thereon "in the absence of objection"; and that Buckholts's application was rejected "subject to the right of appeal." The Land Office was not the final administrative agent in the matter. Appeal from its ruling lay to the Secretary. This ruling, as we have said, was on August 21, 1936. Buckholts filed an appeal on September 18, 1936. On October 26, 1936, Anderson completed compliance with the terms of the Land Office ruling.

The Andersons say that after October 26, 1936, Anderson was the equitable owner of the unrestricted fee simple title to the land, the Government holding the bare legal title as trustee for him, and that the delivery of the patent instrument was merely a ministerial act which can be directed by a court. Appellants argue, citing many cases,[31] that, when an applicant for a land patent has done all that the law requires him to do and is under the law entitled to a patent, the Government thereafter holds the title to the land in trust for him; that an applicant in that position becomes the equitable owner of the property; and that he is entitled to *mandamus* to compel delivery to him of his patent papers. The difficulty with Anderson's case is that he never progressed beyond midway of the administrative process and the basic question at issue had not been decided. That is the real nub of this case. By the express terms of the ruling of the General Land Office, which is the basis for

[31] Lytle, et al. v. Arkansas, et al., 9 How. (50 U.S.) 314, 13 L. Ed. 153 (1850); Wirth v. Branson, 98 U.S. 118, 25 L. Ed. 86 (1878); Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428, 36 L. Ed. 762, 12 S. Ct. 877 (1892); Payne v. Central Pacific Ry., 255 U.S. 228, 65 L. Ed. 598, 41 S. Ct. 314 (1921); Payne v. New Mexico, 255 U.S. 367, 65 L. Ed. 680, 41 S. Ct. 333 (1921); Wyoming v. United States, 255 U.S. 489, 65 L. Ed. 742, 41 S. Ct. 393 (1921).

Anderson's claim that he is the equitable owner, his rights were subject to later consideration by the Secretary.

Appellants rely strongly upon *Wyoming* v. *United States*.[32] That case involved a selection of lieu lands in an exchange, and no patent was provided for in the arrangement. The Court held that the Secretary was required to pass upon the selection list as of the time it was submitted. But the Court expressly pointed out that the rule was different as to the determination of the mineral or non-mineral character of lands in railroad grants. That determination is to be made as of the time the patent issues. The Court cited and discussed *Barden* v. *Northern Pacific R. R., supra,* and inferentially in the strongest fashion reaffirmed it. That the Secretary's determination of mineral or non-mineral character in such a case is a quasi-judicial determination involving discretion was established in *Gaines* v. *Thompson*.[33]

Even if the 1887 Act were held to eliminate the mineral land exclusion from patentability, the requirement for a patent still remained, and the Secretary had to pass upon the application. And in the meantime, in 1914, before any application was filed, Congress imposed a new restriction upon patents to mineral land. That, too, was a matter for the Secretary to pass upon. In the present case it makes no difference whether he was to act as of the date of the application or as of the date of a possible award. In either event the problem of potential value for minerals had already been raised by Buckholts's application under the 1935 Act. The Departmental instructions[34] put the burden on the claimant for a patent. They provided that, if the Geological Survey reported land to be in an area in which oil might occur because of the absence of reliable evidence of geological structure unfavorable to oil, the claimant must

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[32] 255 U.S. 489, 65 L. Ed. 742, 41 S. Ct. 393 (1921).

[33] 7 Wall. (74 U.S.) 347, 19 L. Ed. 62 (1869).

[34] Circular 1344, Jan. 19, 1935, 55 I.D. 120.

make a showing. This was the situation in which Anderson filed his application.

Anderson's argument in essence is that he can compel the Secretary to make a determination that these lands are non-mineral, although in fact there is substantial ground in the reports of the Geological Survey for the Secretary to determine that they are mineral lands and not patentable. But it is established beyond the necessity for citation that the courts cannot control by *mandamus* the nature of decisions entrusted by Congress to executive officials.

Thus upon consideration it appears that the prayer of the complaint is in reality a prayer that property of the United States, as to which Congress has made no mandatory directions, be transferred to the Andersons. It follows that the disposition directed in the *West Coast* case, *supra*, should be made. The case must be dismissed for lack of jurisdiction by reason of the absence of an indispensable party, *i.e.*, the owner of the property, the United States. For this purpose the judgment of the District Court will be vacated and the case remanded for entry of an order of dismissal.

The result of the case appears to be harsh, in that oil and gas rights on property which had been for over half a century in the possession of one family under an ostensible fee simple title, go to a newcomer who applied for a mineral lease on property not then known to be valuable for minerals. But during all those years there was no impedient to Anderson's protection of his complete ownership, and Congress evidently meant to encourage prospecting.

Remanded with directions to dismiss for lack of jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term 1954

No. 11,798

ROSE M. ANDERSON, ET AL., *Appellants*,

v.

DOUGLAS McKAY, Secretary of the Interior, *Appellee*.

Before: Edgerton, Wilbur K. Miller, and Prettyman, Circuit Judges, in Chambers.

Order

Upon consideration of appellants' petition for rehearing in the above entitled case, it is

ORDERED by the Court that the aforesaid petition for rehearing be, and it is hereby, denied.

Per Curiam.

Dated: May 11 1954

ADDENDUM

Act of March 3, 1887, c. 376, Section 5 (24 Stat. 557, 43 U. S. C. A. Sec. 898)

"Sec. 898. *Rights of purchasers from railroads of coterminous lands not within grants.* Where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the

United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefore to the said bona fide purchaser, his heirs or assigns: *Provided,* That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the preemption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said preemption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further,* That this section shall not apply to lands settled upon subsequent to the 1st day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases."

Act of July 17, 1914, c. 142 (38 Stat. 509, 30 U. S. C. A. Sec. 121, 122, 123)

"Sec. 121. *Agricultural entry or purchase of lands withdrawn or classified as containing phosphate, nitrate, potash, oil, or gas; reservations to United States; application.* Lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same; but no desert entry made under the provisions of this section and sections 122 and 123 shall contain more than one hundred and sixty acres. All applications to locate, select, enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of the above-mentioned sections."

"Sec. 122. *Same; patents, reservation in the United States of reserved deposits; acquisition of right to re-*

move deposits; application for entry to disprove classification. Upon satisfactory proof of full compliance with the provisions of the laws under which the location, selection, entry, or purchase is made, the locator, selector, entryman, or purchaser shall be entitled to a patent to the land located, selected, entered, or purchased, which patent shall contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine and remove the same, such deposits to be subject to disposal by the United States only as shall be expressly directed by law. Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the same upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction. Any person who has acquired from the United States the title to or the right to mine and remove the reserved deposits, should the United States dispose of the mineral deposits in lands, may reenter and occupy so much of the surface thereof, as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom, and mine and remove such minerals, upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages. Nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, select, enter, or purchase, under the land laws of the United States, lands which have been withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic mineral lands, with a view of disproving such classification and securing patent without reservation, nor shall persons who have located, selected, entered, or purchased lands subsequently withdrawn, or classified as valuable for said mineral deposits, be debarred from the privilege of showing, at any time before final entry, purchase, or

approval of selection or location, that the lands entered, selected, or located are in fact nonmineral in character."

"Sec. 123. *Same; persons locating lands subsequently withdrawn or classified; patents to.* Any person who has, in good faith located, selected, entered, or purchased, or any person who shall locate, select, enter, or purchase, after July 17, 1914, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same."

Act of February 25, 1920, c. 85, Section 17 (41 Stat. 443, 30 U. S. C. A. Sec. 226), as amended by the Act of August 21, 1935, c. 599 (49 Stat. 676), and Section 20 (41 Stat. 445, 30 U. S. C. A. Sec. 229)

"Sec. 226. *Lease of unappropriated deposits of oil or gas in producing oil or gas field; royalties and annual rentals; cancellation of leases.* All lands subject to disposition under sections 181-194, 201, 202-208, 211-214, 223-229, 241, 251 and 261-263 of this title which are known or believed to contain oil or gas deposits, except as herein otherwise provided, may be leased by the Secretary of the Interior after August 21, 1935, to the highest responsible qualified bidder by competitive bidding under general regulations. Such lands shall be leased in units of not exceeding six hundred and forty acres, which shall be as nearly compact in form as possible. Such leases shall be conditioned upon the payment by the lessee of such bonus as may be accepted and of such royalty as may be fixed in the lease, which shall be not less than 12½ per centum in amount or value of the production and the payment in advance of a rental to be fixed in the lease of not less than 25 cents per acre per annum, which rental except as otherwise herein provided shall not be waived, suspended,

or reduced unless and until a valuable deposit of oil or gas shall have been discovered within the lands leased: *Provided*, That the rental paid for any one year shall be credited against the royalties as they accrue for that year: *Provided further*, That in the event the Secretary of the Interior shall direct or shall assent to the suspension of operations or of production of oil or gas under any such lease, any payment of acreage rental as herein provided shall likewise be suspended during such period of suspension of operations or production: *And provided further*, That in the case of leases valuable only for the production of gas the Secretary of the Interior upon showing by the lessee that the lease cannot be successfully operated upon such rental or upon the royalty provided in the lease, may waive, suspend, or reduce such rental or reduce such royalty.

"The Secretary of the Interior, for the purpose of more properly conserving the oil or gas resources of any area, field, or pool, may require that leases issued after August 21, 1935 under sections 181-194, 201, 202-208, 211-214, 223-229, 241, 251 and 261-263 of this title be conditioned upon an agreement by the lessee to operate, under such reasonable cooperative or unit plan for the development and operation of any such area, field, or pool as said Secretary may determine to be practicable and necessary or advisable, which plan shall adequately protect the rights of all parties in interest, including the United States: *Provided*, That all leases operated under such plan approved or prescribed by said Secretary shall be excepted in determining holdings or control under the provisions of sections 181-194, 201, 202-208, 211-214, 223-229, 241, 256 and 261-263 of this title.

"Leases issued after August 21, 1935 under this section shall be for a period of five years and so long thereafter as oil or gas is produced in paying quantities when the lands to be leased are not within any known geological structure of a producing oil or gas field, and for a period of ten years and so long thereafter as oil or gas is produced in paying quantities when the lands to be leased are within any known geological structure of a producing oil or gas field; *Provided*, That no such lease shall be deemed to expire by reasons of suspension of prospecting, drilling, or pro-

duction pursuant to any order or consent of the said Secretary: *Provided further,* That the person first making application for the lease of any lands not within any known geologic structure of a producing oil or gas field who is qualified to hold a lease under sections 181-194, 201, 202-208, 211-214, 223-229, 241, 251, and 261-263 of this title, including applicants for permits whose applications were filed after ninety days prior to August 21, 1935 shall be entitled to a preference right over others to a lease of such lands without competitive bidding at a royalty, in the case of oil, of 12½ per centum in amount or value of the production when the said production does not exceed fifty barrels per well per day for the calendar month and of not less than 12½ per centum in amount or value of the production when the said production exceeds fifty barrels per well per day for the calendar month, and, in the case of gas, at a royalty of 12½ per centum in amount or value of the production when the said production does not exceed five million cubic feet per well per day for the calendar month and, when the said production exceeds five million cubic feet per well per day for the calendar month, at a royalty of not less than 12½ per centum in amount or value of the production.

"Leases issued prior to August 21, 1935 shall continue in force and effect in accordance with the terms of such leases and the laws under which issued: *Provided,* That any such lease that has become the subject of a cooperative or unit plan of development or operation, or other plan for the conservation of the oil and gas of a single area, field, or pool, which plan has the approval of the Secretary of the Department or Departments having jurisdiction over the Government lands included in said plan as necessary or convenient in the public interest, shall continue in force beyond said period of twenty years until the termination of such plan: *And provided further,* That said Secretary or Secretaries shall report all leases so continued to Congress at the beginning of its next regular session after the date of such continuance.

"Any cooperative or unit plan of development and operation, which includes lands owned by the United States, shall contain a provision whereby authority, limited as therein provided, is vested in the Secretary

of the department or departments having jurisdiction over such land to alter or modify from time to time in his discretion the rate of prospecting and development and the quantity and rate of production under said plan. The Secretary of the Interior is authorized whenever he shall deem such action necessary or in the public interest, with the consent of lessee, by order to suspend or modify the drilling or producing requirements of any oil and gas lease not subject to such a cooperative or unit plan, and no lease shall be deemed to expire by reason of the suspension of production pursuant to any such order.

"Whenever it appears to the Secretary of the Interior that wells drilled upon lands not owned by the United States are draining oil or gas from lands or deposits owned in whole or in part by the United States, the Secretary of the Interior is hereby authorized and empowered to negotiate agreements whereby the United States or the United States and its permittees, lessees, or grantees shall be compensated for such drainage, such agreements to be made with the consent of the permittees and lessees affected thereby.

"Whenever the average daily production of the oil wells on an entire leasehold or on any tract or portion thereof segregated for royalty purposes shall not exceed ten barrels per well per day, or where the cost of production of oil or gas is such as to render further production economically impracticable the Secretary of the Interior, for the purpose of encouraging the greatest ultimate recovery of oil and in the interest of conservation of natural resources, is authorized to reduce the royalty on future production when in his judgment the wells cannot be successfully operated upon the royalty fixed in the lease. The provision of this paragraph shall apply to all oil and gas leases issued under sections 181-194, 201, 202-208, 211-214, 223-229, 241, 251 and 261-263 of this title, including those within an approved cooperative or unit plan of development and operation.

"Any lease issued after August 21, 1935 under the provisions of this section, except those earned as a preference right as provided in section 223 of this title,

shall be subject to cancelation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. Such notice in advance of cancelation shall be sent the lease owner by registered letter directed to the lease owner's record post-office address, and in case such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States Land Office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such leased land, then in the post office nearest such land. Leases covering lands known to contain valuable deposits of oil or gas shall be canceled only in the manner provided in section 188 of this title."

"Sec. 229. *Preference right to permits or leases of claimants of lands bona fide entered as agricultural land; terms and conditions.* In the case of lands bona fide entered as agricultural, and not withdrawn or classified as mineral at the time of entry, but not including lands claimed under any railroad grant, the entryman or patentee, or assigns, where assignment was made prior to January 1, 1918, if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery; and within an area not greater than a township such entryman and patentees, or assigns, holding restricted patents may combine their holdings, not to exceed two thousand five hundred and sixty acres for the purpose of making joint application. Leases executed under this section and embracing only lands so entered shall provide for the payment of a royalty of not less than 12½ per centum as to such areas within the permit as may not be included within the discovery lease to which the permittee is entitled under section 223 of this title."

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 272

ROSE M. ANDERSON, ET AL., PETITIONERS

v.

DOUGLAS MCKAY, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court for the District of Columbia issued no opinion. The opinion of the Court of Appeals (Pet. 28-44) is reported at 211 F. 2d 798.

JURISDICTION

The judgment of the Court of Appeals was entered March 25, 1945. A petition for rehearing was denied May 11, 1954 (Pet. 45). The petition

for a writ of certiorari was filed August 9, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether, when the Geological Survey reports to the Secretary of the Interior that public lands have a prospective oil and gas value, an applicant for a patent to the fee under section 5 of the Act of March 3, 1887, 43 U. S. C. 898, is confined by section 3 of the Act of July 17, 1914, 30 U. S. C. 123, to a patent which reserves to the United States the right to prospect for, mine and remove oil and gas.

STATUTES INVOLVED

The material parts of section 5 of the Act of March 3, 1887, 24 Stat. 556, 43 U.S.C. 898, and of section 3 of the Act of July 17, 1914, 38 Stat. 510, 30 U.S.C. 123, appear in the Statement at pages 3 and 4, *infra*, respectively.

STATEMENT

The land involved in this suit was within the limits of the grants made by two Acts of Congress to a corporation which became the Kansas Pacific Railway Company (R. 20). The latter conveyed the land to Warren, a bona fide purchaser for value (R. 20). Charles J. Anderson, petitioners' ancestor, succeeded to this interest by virtue of a conveyance on December 11, 1897 (R. 21). But the land was never patented to the railroad (R. 20).

On March 2, 1936—when the land was shown as vacant on the tract book of the General Land Office (R. 20)—E. E. Buckholts filed an application for an oil and gas lease under section 17 of the Act of February 25, 1920, 41 Stat. 443, as amended, 30 U.S.C. 226 (R. 19). That section gives the first qualified applicant a preference right to a lease of public lands "not within any known geologic structure of a producing oil or gas field."

On the following July 20, Anderson filed an application to purchase the land under section 5 of the Act of March 3, 1887, 24 Stat. 557, 43 U.S.C. 898 (R. 19-20). That section provided:

> That where any said company [1] shall have sold to citizens of the United States * * * lands not conveyed to or for the use of such company * * * and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns * * * .

The General Land Office held that Anderson's application should be granted and that of Buckholts

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[1] As shown by section 2 of the Act, 24 Stat. 556, "said company" means "any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad."

rejected (R. 63-66). Buckholts appealed to the Secretary of the Interior. Anderson, as directed by the Land Office decision, paid to it the purchase price of the land and filed proof of publication of his application. (R. 21.)

On December 31, 1936, the Secretary of the Interior reversed the decision of the General Land Office (R. 67-72), 56 L.D. 44. He held that the privilege to purchase conferred by section 5 of the Act of March 3, 1887, had been modified by section 3 of the Act of July 17, 1914, 38 Stat. 510, 30 U.S.C. 123. The latter section apparently had not been considered by the General Land Office. It provides:

> That any person who has, in good faith, located, selected, entered, or purchased, or any person who shall hereafter locate, select, enter, or purchase, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, *which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same.* [Emphasis added.]

Consequently, the Secretary concluded (R. 72) that: "If the land in question is known to be valuable for oil or gas, actually or merely prospectively, Anderson must file a waiver of right to such minerals."

On June 22, 1937, the Geological Survey reported to the General Land Office that the land had "a prospective value for oil and gas" (R. 23, 84). On Anderson's petition to the Secretary for an exercise of his supervisory authority, the latter held that an oil and gas lease should be issued to Buckholts unless Anderson submitted facts overcoming the Survey's conclusions (R. 86-87). Anderson made a submission which the Survey reported "presents no geologic information beyond that previously available to the Geological Survey," and hence afforded no basis for modifying its previous conclusion (R. 87).

As a result the Secretary denied Anderson's petition on September 24, 1940 (R. 86-88). Nearly four years later, his application was finally rejected (R. 88). As of May 1, 1947, an oil and gas lease to the land was issued to Buckholts who assigned it to the Central Commercial Company (see R. 94). On or about October 22, 1951, that company brought in a producing well which was completed on November 15, 1951. Since then other producing wells have been completed (R. 26). A second petition for exercise of the Secretary's supervisory authority (R. 25) was denied May 2, 1952 (R. 92-95).

Thereafter, petitioners brought this suit to compel the Secretary to issue them a patent without a mineral reservation (R. 2-11). The district court dismissed the complaint on the ground that the 1887 Act had been modified by the 1914 Act. The Court of Appeals took the same view of the law, but vacated the district court's judgment and remanded the case with directions to dismiss the suit because of the absence of the United States, an indispensable party.[2]

ARGUMENT

There is no occasion for petitioners' argument (Pet. 10-17) as to the purpose and effect of section 5 of the Act of March 3, 1887. Even if, in the absence of subsequent legislation, the 1887 Act would have entitled Anderson to the unqualified patent for which he applied on July 20, 1936, the Act simply granted a "privilege" (*Ramsey* v. *Tacoma Land Co.*, 196 U. S. 360, 363) which could be "modified or entirely extinguished by Congress while it [was] in an inchoate condition." *Clogston* v. *Palmer*, 32 L. D. 77, 83[3] (Pet. 34). The question therefore is whether the privilege was modified by section 3 of the Act of July 17, 1914, enacted before Anderson sought to purchase a patent. Petition-

[2] This disposition of the case resulted from the earlier decision of the same court in *West Coast Exploration Co.* v. *McKay*, 213 F. 2d 582, certiorari denied, 347 U.S. 989 (see Pet. 44).

[3] The opinion in *Clogston* v. *Palmer* was prepared under direction of the then Assistant Attorney General Willis Van Devanter.

ers' contention that the privilege was not affected is mere assertion (see Pet. 2, 16, 17). This is understandable when regard is had to the comprehensive language of the 1914 Act. It applies to "any person * * * who shall hereafter * * * purchase, under the nonmineral land laws of the United States * * *." As the court below concluded (Pet. 36): "In the face of these unqualified provisions we do not see how we could by construction write an exception into the statute. We cannot exempt from its terms applicants under the 1887 Act when Congress has not done so."

The 1914 Act limited applicants like Anderson to a patent reserving the oil and gas rights to the United States if the land was reported as valuable for those purposes. This land was so reported.[4] Consequently the remainder of the petition (Pet. 17-27), devoted to a discussion of "Anderson's right to a fee simple patent under Section 5 of the 1887 Act" (Pet. 2), i.e., a patent without a mineral reservation, is irrelevant and immaterial.

Moreover, contrary to petitioners' assertions (Pet. 10, 11, 17, 27), the question presented is not generally important. The Secretary of the Interior was first called on to pass upon the relation

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[4] The petitioners' assertion that the Geological Survey has taken a vacillating position on the prospects for oil on the property is without foundation (Pet. 26). The statement that the land was not "within the known geologic structure of a producing oil or gas field" (R. 24) was entirely consistent with the earlier report that "The land referred to is in an area which may contain accumulations of oil or gas under favorable structural conditions" (R. 23).

between the Act of 1887 and that of 1914 in the instant case. Since his decision therein (on December 31, 1936) he has had no further occasion to consider the matter. Thus it appears that the question has arisen but once in 40 years.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER, 1954.

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IN THE

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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DOUGLAS McKAY, Secretary of the Interior, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners, Rose M. Anderson, et al., appellants below, respectfully pray that this Honorable Court reconsider and grant their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled cause on March 25, 1954.

The petition for a writ of certiorari was filed on August 9, 1954 and was denied by order of this Honorable Court

on October 14, 1954. In support of this petition for rehearing, petitioners rely upon the following intervening ground which was not called to the attention of this Court in their original petition.

On September 1, 1954, three weeks after the petition was filed in the instant case, Congress approved S. 3251 which became Private Law 988 (83rd Congr., 2nd Sess.) in which the Secretary of the Interior was "authorized and directed to convey by quitclaim deed and without compensation to Mrs. Pearl O. Marr, of Crossroads, New Mexico, all oil, gas, or other mineral rights which are held by the United States in [two hundred and eighty acres of land] situated in Lea County, New Mexico * * *". On that date not only was the land known to be valuable for oil and gas, but oil and gas leases covering the land had already been issued by the United States Government to third parties. Therefore, Private Law 988 specifically provided that "Mrs. Pearl O. Marr shall succeed to the position of the United States as lessor at the time the Secretary of the Interior makes conveyance under this Act".

The facts in the *Marr* case are briefly as follows: On July 18, 1924 Mr. Marr made his enlarged homestead entry under the Enlarged Homestead Act of February 19, 1909, c. 160 (35 Stat. 639, 43 U.S.C., sec. 218) which provides, in part, that:

> "Any person who is a qualified entryman under the homestead laws of the United States may enter * * * three hundred and twenty acres, or less, of *nonmineral* * * * public lands * * *". (Emphasis supplied)

On January 19, 1927 an oil and gas prospecting permit application was filed for the land under the Mineral Leasing Act of February 25, 1920, c. 85 (41 Stat. 437, 30 U.S.C., sec. 181). On July 28, 1927, *before* Mr. Marr had submitted final proof, the land was classified by the Geological Survey as prospectively valuable for oil and gas. Mr. Marr did not attempt to have the land reclassified by sub-

mitting a showing that the land was not in fact valuable for oil and gas. Instead, he elected to accept a patent containing a mineral reservation to the United States which was issued on March 1, 1929.

The Secretary of the Interior was opposed to the bill for the relief of Mrs. Marr, the successor in interest to Mr. Marr. By letter, dated June 18, 1954, to the Chairman, Senate Committee on Interior and Insular Affairs, the Assistant Secretary of the Interior recommended that the bill not be enacted, and he specifically stated that the issuance of several fee simple patents to certain other homesteaders within the vicinity of the Marr entry which had been called to the Committee's attention was not inconsistent with the Department's holding in the *Marr* case. He pointed out that in each of those cases the patent applicant had perfected his claim *prior* to the mineral classification of the land; hence, the Government had the burden of proving that those lands were known to be valuable for minerals at the time of final proof. Since the Government could not meet the burden of proof in those cases, each of the patent applicants received a fee simple patent. In explaining why those applicants had obtained fee simple patents while Mr. Marr was required to waive all mineral interests in order to obtain his patent, the Assistant Secretary made the following statements:

> "Mr. Marr made his enlarged homestead entry on July 18, 1924. On January 19, 1927, an oil and gas prospecting permit application was filed for the lands under the act of February 25, 1920 (30 U.S.C., sec. 181). The Geological Survey classified the land as prospectively valuable for oil and gas, and recommended that an oil and gas permit be issued. *Since the classification took place before Mr. Marr made final proof on his entry, he had the burden of proving that the classification was improper.* Mr. Marr was informed on August 19, 1927, that he must appeal the decision or file a waiver of the oil and gas. He chose to submit the waiver on September 5, 1927. The lands are now covered by oil and gas leases issued by the

United States. The Geological Survey reports that production has been obtained from lands nearby.

"One or two persons who owned land within 20 miles of the Marr entry were able to obtain title to their lands without reservation of oil and gas. *In these cases, it appears that the entryman filed proof in the thirties prior to any classification of their lands as valuable for oil and gas, and they elected to contest the classification. This meant that in order to make a mineral reservation, the Government had to prove that the lands were known to be valuable for oil or gas at the time final proof was made.* In view of the low level of mineral exploration activity during those years, the Government could not make a positive showing that the lands were, as they are now clearly known to be, valuable for oil and gas." (Emphasis supplied.)

The position of Anderson in the instant case is precisely the same as that of the individuals referred to in the second paragraph of the above quotation who had obtained patents without any mineral reservation. (See Petition for a Writ of Certiorari, Point II, pp. 17-23.) Anderson perfected his claim on October 26, 1936, and at that time the land was not known or even suspected to have mineral value. Not until June 22, 1937 was the land reported by the Geological Survey as having a prospective value for minerals.

The statements of the Assistant Secretary quoted above are an affirmation and restatement of the rules set forth in the Department's Regulations (Circular No. 1344), 55 I.D. 120, referred to and quoted from at pages 24-25 of the petition for a writ of certiorari in the instant case. The Secretary of the Interior refused to follow those rules in the instant case. Indeed, throughout this protracted litigation, both in the Department and in the courts below, the Secretary has consistently refused to even state why those regulations were not applied and followed in this case. As petitioners pointed out in their petition, the regulations and the Assistant Secretary's statements with respect to

the *Marr* case are simply an application of the principles of law which were so clearly set forth and explained by this Court in *Wyoming* v. *United States,* 255 U.S. 489 (1921) but which the court below refused to follow. Under those principles, petitioners are legally entitled to a fee simple patent.

In its report on Senate Bill 3521 for the relief of Mrs. Marr, the Senate Committee on Interior and Insular Affairs stated that:

> "The equities in the case indicate that relief should be granted to Mrs. Marr." (Report No. 2003, p. 2)

The equities of Mr. Anderson, now deceased, and of Mrs. Anderson, his 96-year old widow, who with their nine children are your petitioners in the instant case, are far greater than were the equities of Mrs. Marr. At the time when the application for an oil and gas permit was filed on Mr. Marr's land, he knew that his title was unperfected. In contrast, in the instant case it was the filing of a non-competitive oil and gas lease application which first gave Anderson notice that a defect existed in his title. Until that time he had no reason to suspect that his title was defective because the records in Trego County, Kansas, indicated a perfect chain of title in him. For almost forty years prior to the time that Buckholts, the interloper, filed his mineral lease application Anderson and his family had occupied, cultivated and paid taxes on the land believing that they held good fee simple title. Mr. Marr's land was classified as prospectively valuable for minerals *before* he had perfected his claim, and he chose to execute a waiver of all mineral rights and to accept a patent containing a mineral reservation to the United States Government. In the instant case, the land was not classified as prospectively valuable for minerals until *after* Anderson had perfected his claim. Anderson and his heirs have never waived their mineral rights, but have consistently refused to accept a

patent containing a mineral reservation to the Government.

Congress adopted Section 5 of the Act of March 3, 1887, c. 376 (24 Stat. 556, 43 U.S.C., sec. 898) for the relief of old settlers precisely like Anderson. Similarly, by approving the bill for the relief of Mrs. Marr as well as by passing numerous other public and private bills conveying fee simple title in public lands to settlers having equitable claims thereto,* Congress has clearly indicated a policy of fully protecting the rights of *bona fide* settlers rather than of restricting such rights as the court below erroneously imputed to Congress.

The decision of the court below is squarely in conflict with the decision of this Court in *Wyoming* v. *United States, supra*, the regulations of the Department of the Interior, and the statements of the Assistant Secretary in the *Marr* case. If the decision is left unchanged, it will confuse the rights of many persons situated like Anderson and will throw upon Congress the burden of considering and passing upon a large number of both public and private bills designed to give claimants rights which Congress has already indicated an intention to give them.

We respectfully submit that such a condition should not be permitted to exist until this Honorable Court has re-

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* An examination of the records of the House Committee on Interior and Insular Affairs indicates that Congress has passed a large number of private bills giving relief to persons having an equitable claim to public lands, especially where the claimants were, like the Andersons in the instant case, old settlers who through some technicality had failed to perfect their right to fee simple patents.

A recent example in the public bill category is the Act of April 17, 1954, c. 152 (68 Stat. 56, Public Law 337, 83d Congress, 2d Sess.), in which the Secretary of the Interior was authorized and directed to issue to old settlers in the North Platte Reclamation Project in Nebraska fee simple patents without mineral reservations. That Act specifically provided that in cases where Government mineral leases were already outstanding, the patent claimant should be subrogated to the rights of the United States under the lease.

viewed and settled the law defining the rights of petitioners and the many other claimants like them. We earnestly urge that the petition for a writ of certiorari be reconsidered and that the writ be granted.

Respectfully submitted,

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Certificate of Counsel

The undersigned counsel of record in the instant case hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that the petition is restricted to the grounds specified in Rule 58(2) of this Honorable Court.

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